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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-44

ROBERT BURRELL, et al.,

Petitioners,

v.

MILTON McCRAY, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MOTION NE RECIPIATUR

Petitioners, by their attorneys, Francis B. Burch, Attorney General of Maryland, Henry R. Lord, Deputy Attorney General of Maryland, Donald R. Stutman and Glenn E. Bushel, Assistant Attorneys General, move, pursuant to Rule 35, Rules of the United States Supreme Court, that the Supplemental Brief for Respondents filed herein not be received, or, in the alternative, be stricken, and for reasons say:

1. That pursuant to Rule 41(5), Rules of the United States Supreme Court, a party may present to this Court late authorities, newly-enacted legislation, or other intervening matters not available at the time their brief in chief was filed.

2. That Respondents have filed a Supplemental Brief (received by Petitioners on April 21, 1976) incorporating, in essence, new issues and material all of which was available when their Appellees' (Respondents') brief was filed on February 9, 1976.

3. That the Supplemental Brief for Respondents, although it cites Rule 41(5), does not comply with its terms in that it does not present any information within the contemplation of that rule.

WHEREFORE, Respondents pray that the Supplemental Brief for Respondents be not received, or, in the alternative, be stricken.

Francis B. Burch
Attorney General of Maryland

Henry R. Lord
Deputy Attorney General
of Maryland

Donald R. Stutman
Assistant Attorney General
of Maryland

Glenn E. Bushel
Assistant Attorney General
of Maryland

Attorneys for Petitioners

I HEREBY CERTIFY, That on this 23rd day of April, 1976, a copy of the aforegoing Motion Ne Recipiatur, together with the Memorandum in support thereof, was mailed, postage prepaid, to Charles F. Morgan, Esq., Barbara M. Milstein, Esq., Michael Millemann, Esq., and C. Christopher Brown, Esq., Attorneys for Respondents, 341 North Calvert Street, Baltimore, Maryland 21202.

Donald R. Stutman
Assistant Attorney General
of Maryland

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MEMORANDUM IN SUPPORT OF
MOTION NE RECIPIATUR

Rule 41(5), Rules of the United States Supreme Court, provides:

> Whenever a party desires to present late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief, he may file forty printed copies of a supplemental brief, restricted to such new matter and otherwise in conformity with these rules, up to the time the case is called for hearing, or, by leave of court, thereafter. [Emphasis supplied.]

Respondents were originally required to file their brief on January 28, 1976, and by letter dated January 20, 1976, directed to the Clerk, requested an extension to and including February 9, 1976. That extension was granted by the Clerk by letter dated January 22, 1976.

(1) Respondents improperly raise not only "intervening matters" but also what amounts to a new issue in their supplemental brief. Succinctly stated, they allege that Respondent Stokes, who requested, in his original complaint, not only damages but declaratory and injunctive relief, will now be satisfied with any decision finally rendered in the case of Hopkins v. Collins, ___ F. Supp. ____, No. K-74-369 (D. Md., Dec. 11, 1975). See A32a through 36a. While Respondent Stokes may or may not be satisfied with any decision in Hopkins v. Collins, he has made no effort, at this point, to dismiss his claims for injunctive or declaratory relief. Further, even though Respondent Stokes is no longer incarcerated at the Maryland Penitentiary, there is a real possibility that he will be returned to the Maryland Penitentiary and would therefore continue the litigation.

The issue of exhaustion of state administrative remedies is still viable in the two cases on appeal regarding Respondent McCray, as the trial court in this case granted the State's motions to dismiss. Finally, Respondent Washington claimed not only monetary damages, but declaratory and injunctive relief. Those claims have not been excised from Respondent Washington's complaint at this time. See A239a-242a.

Respondents allege in their first argument that as only monetary damages remain for consideration by the Grievance Commission, no relief could be granted and therefore this case is moot. They support this argument by citation to Hopkins v. Collins, supra, and Stokes v. Institutional Board of Review, No. 45341-A (Circuit Court No. 2 of Baltimore City, Jan. 23, 1976). Hopkins v. Collins, supra, was decided on December 11, 1975, and Stokes v. Institutional Board of Review, supra, was decided on January 23, 1976. In both cases, Charles F. Morgan, Esq., attorney for Respondents in this case, was attorney for plaintiffs Hopkins and Stokes. He therefore had actual knowledge of the decisions in

those cases long before his brief was due to be filed in this Court on February 9, 1976. Pursuant to Rule 41(5), Respondents' first argument presents no "late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief" and are not properly filed under that rule.

(2) Respondents' second argument relates to information regarding decisions of the Maryland Inmate Grievance Commission from January 1, 1976, through and including April 13, 1976. Respondents attempt to prove, by these figures, that the Maryland Inmate Grievance Commission is ineffective, but fail to elaborate on the types of complaints reviewed, the nature of the relief granted, or the reasons that certain decisions of the Maryland Inmate Grievance Commission were reversed by the Secretary of Public Safety and Correctional Services. Not only was most of this information available to Respondents when their brief in chief was written, but it is statistically unreliable because Respondents chose a relatively short period of time to gather those statistics. See, for example, Petitioners' Brief, footnote 12 at 42 and footnote 34 at 87-89.

In summary, Respondents have not presented to this Court any "late authorities, newly enacted legislation, or other intervening matters that were not available in time to have been included in his brief in chief." Under these circumstances,

Respondents' Supplemental Brief should not be received or, in the alternative, should be stricken.

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